



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**SUCCESSION CAUSE NO. 652 OF 2004**  
**IN THE MATTER OF THE ESTATE OF**  
**PHANUEL OKUMU ONGUDI (DECEASED)**

**BETWEEN**

**ATHUR WILLIAM OLAYO OKUMU ..... 1<sup>ST</sup>**  
**APPLICANT**

**KENNEDY ODHIAMBO OLAYO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HEZEKIAH ONGUDI OKUMU .....  
PETITIONER/RESPONDENT**

**RULING**

1. This matter concerns the estate of **Phanuel Okumu Ong'udi** (“the deceased”) of East Karateng' within Kisumu County who died on 9<sup>th</sup> November 1982. His son Hezekiah Ong'udi Okumu (“Hezekiah”) applied for letters of administration intestate by the petition filed on 23<sup>rd</sup> June 2004. In the affidavit in support of the petition (Form P & A 5), he stated that the deceased was survived by himself and Joab Angugo. He also stated that the deceased had left behind two properties **KISUMU/KARATENG/574** and **839 (Plots 574 and 839** respectively). He was issued with a grant of letters of administration on 14<sup>th</sup> August 2007 which was confirmed on 11<sup>th</sup> April 2008 with both properties being given to him.

2. In due course the applicant, Arthur William Olayo Okumu (“Arthur”) and his son, Kennedy Odhiambo Olayo, moved the Court by summons dated 24<sup>th</sup> August 2012 to revoke the grant issued to Hezekiah. Arthur claimed that Hezekiah had failed to disclose material facts as he had deliberately excluded the applicant and his son. He also claimed that the deceased properties ought to be distributed equally amongst all the beneficiaries.

3. The matter was side tracked by several applications filed by Arthur claiming that Hezekiah was interfering with the boundaries on Plot 574. Having read the applications and depositions in support and opposition, I concluded that the matter in issue was the distribution of the deceased’s property as the deceased’s survivors were not disputed. To determine the matter with finality, I directed the parties to file affidavits to show how the property deceased’s properties should be distributed. I then took viva voce evidence.

4. The uncontested facts that emerged from the evidence were that the deceased had only one wife, Joyce

Ngayi Arodi. Arthur was the first born, the other children were James Olango (“Olango”), Hezekiah, Joab Angugo (“Angugo”) and the only daughter, Plister Ongwanyo, who is deceased.

5. In paragraph 9 of the joint affidavit sworn on 24<sup>th</sup> August 2012, the applicants deponed that Arthur had been given **Plot 587** by the deceased. Arthur’s case is that the deceased had several properties; **Plots 574, 839, 587** and **1282** and although he was given **Plot 587**, he took the position that Hezekiah did not disclose all the other properties nor inform him that he had applied for letters of administration. He told the court that all the deceased’s properties should be pooled together and divided equally amongst the brothers.

6. Hezekiah testified that Arthur had been given **Plot 587** by their father in 1967 and that before he died he distributed his property by showing his sons where to construct their houses. He gave Olang'o **Plot 839** to put up his home while **Plot 574** was left for himself and Angugo. Hezekiah complained that Arthur created problems in the family by deciding to build his home on **Plot 574** yet he was meant to move out and establish his home on **Plot 574** which had been given by his father and leave the property to the last born as required by Luo Customary Law. Hezekiah further testified that Arthur had taken the family to the Land Disputes Tribunal and Appeals Tribunal which ruled against him and directed him to vacate **Plot 574** and move to his **Plot 587**.

7. As the deceased died without a spouse but left surviving children his estate it to be distributed under the provisions of **section 38** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* (“the Act”) which provides that his estate is to be shared equally amongst his surviving children. In distributing the property, the court is entitled to take account the property the deceased gave to his children during his lifetime. **Section 42** of the Act provides as follows;

42. Where-

(a) *an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.*

*That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.*

8. Before I deal with the issue of distribution, I note that the applicant herein failed to disclose facts material to the application for grant. He ought to have disclosed all the deceased surviving children and if they were dead, the children of the deceased's children. Further the petitioner ought to have disclosed all the property including that bequeathed to Hezekiah prior to his death. If all these facts had been disclosed perhaps this matter would have been concluded earlier.

9. I would also point out that the 2<sup>nd</sup> applicant has not locus standi to agitate this matter as he is not a direct beneficiary of the deceased’s estate. As his father his alive, his interest can best be described as inchoate.

10. Turning back to the matter, there are two issues for consideration are as follows;

a. Whether, the deceased had given Hezekiah **Plot 587** prior to his death.

b. Whether **Plot 1282** is part of the deceased's estate and therefore liable for distribution as part of the deceased estate.

11. The fact that Arthur was given **Plot 587** by his father was confirmed by William Ondeng' Omega (PW2), who was called by Arthur as a witness. Both Hezekiah and William told the Court that presently one of Arthur's wives is settled on the land. In addition to the testimony, the issue of **Plot 587** was litigated before the then existing Land Disputes Tribunal. In the decree issued by the Court in **Chief Magistrate's Court, Land Case No. 16 of 2011 (Arthur W. Olayo Okumu v Hezekiah Ong'udi Okumu)**, the Court stated as follows:-

1. THAT Defendant (Mr. Hezekiah Ongudi Okumu) to sub divide the land to the sons of the late Joab Angugo according to the portion given to the land and be registered in the name of their mother if she is still alive if not her sons.

2. THAT the portion for water borehole which is in the parcel of land be sub-divided and the water to be for the Community use. The parcel for water bore hole be registered in the name of the group and be given its own parcel community to meet the cost of transaction.

3. THAT Plaintiff (Arther W. Olayo) to go to his parcel of land KSM/Karateng/587 to leave room for the defendant to divide the land accordingly as he (Plaintiff) has not stayed in the land for many years to guarantee him to stay in the land according to law.

4. THAT the remaining portion which was for the late James Olango be divided equally by the defendant and the family of Joab Angugo.

5. THAT the family of Joab Angugo to meet the cost of transfer for their portion.

6. THAT the defendant and the family of Joab Angugo to go to Lands office, get a surveyor and sub-divide the land for them according to the portions which was given to them by their grandmother and father. [Emphasis mine]

12. Arthur appealed to the **Nyanza Land Disputes Appeals Committee (Case No. 095/2010)** which dismissed the appeal on the following terms:-

a. The disputed land KISUMU/KARATENG/574 is registered in the name of Ongudi Okumu Hezekiah.

b. Arthur William Olayi has his own land registered in his name; i.e., KISUMU/KARATENG/587.

c. The father of the appellant and the respondent had allocated several pieces of land to his son in accordance with the Luo Customary Laws.

13. The two decisions of the Tribunals confirm two important facts; first that the deceased had allocated land to his sons before his death and second, Arthur has been given Plot No. **587** by his father in 1967. The two decisions cannot be wished away. They constitute an estoppel by record as they are a determination over the same subject matter between the same parties by competent tribunals.

14. On the second issue, Arthur complained that Hezekiah had failed to disclose the fact that he had been given Plot **1282** by the deceased. Hezekiah told the Court that the said plot was not part family land but his own land which he acquired in 1977 and which was registered in his name. It was the duty of Hezekiah to prove this fact on the balance of probabilities. Following the Tribunal decisions, I have alluded to above, the issue in those cases concerned the distribution of the property while the deceased was alive. Nothing was said about **Plot 1282** otherwise Hezekiah would have been told to go and live on his own land like just like Arthur. This, to my mind, diminishes Arthur's contention that **Plot 1282** belongs to the deceased's estate.

15. I find that Arthur was already given land by the deceased being Plot No. **587** measuring **2.0Ha**. This portion is similar in size to what his brothers would get once the property is distributed fairly. The proposal made by Hezekiah provides for nearly equal portions to the other sons of the deceased. He has also provided a sketch plan of how the same shall be divided hence I find the distribution fair in the circumstances and there is no opposition to it from other members of the family, I will confirm the grant on that basis.

16. I revoke the certificate of confirmation of grant issued to Hezekiah Okumu on 11<sup>th</sup> April 2008 as it did not comply with the proviso to **section 71(2)** of the **Law of Succession Act** which requires the court to ascertain the persons beneficially entitled to a share of the deceased's estate.

17. In conclusion, I now make the following orders;

- a. The application dated 24<sup>th</sup> August 2016 is dismissed.
- b. The certificate of confirmation of grant issued to Hezekiah Okumu on 11<sup>th</sup> April 2008 is revoked and the grant issued to him now confirmed on the following terms;
  - i. **KISUMU/KARATENG/574**; Hezekiah Ong'udi Okumu - 1.2 Ha, Joab Angugo Okumu - 1.1 Ha, James Olango - 1.1 Ha
  - ii. **KISUMU/KARATENG/839**; Hezekiah Ong'udi Okumu - 0.7 Ha, Joab Angugo Okumu - 0.4 Ha, James Olango - 0.4 Ha
- c. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 5<sup>th</sup> day of December 2016**

**D. S. MAJANJA**

**JUDGE**

Parties appeared in person.